UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 5:13-CV-01092-D
	§	
KATHLEEN SEBELIUS, et al.,	§	
	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, REQUEST FOR EXPEDITED CONSIDERATION, AND BRIEF IN SUPPORT

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Plaintiffs Reaching Souls International, Inc. ("Reaching Souls"), Truett-McConnell College, Inc. ("Truett-McConnell"), by themselves and on behalf of all others similarly situated, and GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone") (collectively "Plaintiffs") seek a preliminary injunction prohibiting Defendants from enforcing the Affordable Care Act's ("ACA")[1] requirement that they facilitate access to abortion-inducing products and related education and counseling under their health plans (the "Mandate") in violation of their shared religious beliefs.

Reaching Souls and Truett-McConnell are ministries committed to living their Christian faith and sharing the good news about Jesus Christ. Reaching Souls does this by training evangelists and caring for orphans in Africa, Cuba, and India. Truett-McConnell equips its students with a Biblically-based liberal arts education.

Plaintiffs' commitment to their faith precludes them from participating in the government's scheme to subsidize and promote use of abortifacients under group health plans. As a matter of religious exercise, Reaching Souls and Truett-McConnell exclude abortifacients from their health plans through GuideStone, which offers health benefits for Southern Baptist and evangelical Christian employers consistent with their faith.

The government admits that the Mandate affects the religious liberty of non-profit organizations and has exempted a narrow category of religious organizations—institutional churches, their integrated auxiliaries, and the exclusively religious activities

[1] Together, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 1119 (2010) and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

of religious orders. Ministries like Reaching Souls and Truett-McConnell, that do not meet this strict test, must designate their insurer or health benefits administrator to deliver the objectionable abortifacients. The government calls this an "accommodation," but it fails to accommodate Reaching Souls and Truett-McConnell's religious beliefs, which preclude them from designating anyone to provide abortifacients.

Starting on January 1, 2014, Defendants will impose massive fines on non-exempt ministries that receive health benefits through GuideStone unless and until they cooperate with the Mandate in a manner that violates their religious beliefs. The Mandate will also force GuideStone to shrink its religious mission dedicated to offering health benefits to Southern Baptist and evangelical Christian employers consistent with their faith.

The Mandate violates the Religious Freedom Restoration Act ("RFRA") for the reasons recently set forth in *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1137-1145 (10th Cir. 2013). The Mandate also violates the First Amendment, both because it impermissibly prefers some religious organizations over others, and because it restricts Plaintiffs' speech. These openly religious Plaintiffs are currently in the process of arranging benefit plans for the coming year, and they should be free to do so without illegal coercion under the Mandate. Plaintiffs therefore request a preliminary injunction protecting them and other non-exempt ministries that depend on GuideStone for their health benefits from the Mandate during the course of this litigation. Other courts in this Circuit have not hesitated to grant a preliminary injunction under similar circumstances. *See Newland v. Sebelius,* 881 F. Supp. 2d 1287, 1294-95 (D. Colo. 2012), *aff'd,* __ F.3d ____, 2013 WL 5481997 at **2-3 (10th Cir. Oct. 3, 2013); *Briscoe v. Sebelius*, 2013 WL

4781711, at *5 (D. Colo. Sept. 6, 2013); *Hobby Lobby Stores, Inc. v. Sebelius,* No. CIV-12-1000-HE, 2013 WL 3869832, at *3 (W.D. Okla. July 19, 2013); *Armstrong v. Sebelius*, No. 13-CV-00563-RBJ, 2013 WL 5213640, at *3 (D. Colo. Sept. 17, 2013) (granting preliminary injunction on remand), *prior to remand,* No. 13-1218, 2013 WL 4757949 (10th Cir. Sept. 5, 2013) (vacating district court's order and remanding for reconsideration in light of Hobby Lobby).

BACKGROUND

The Abortifacient Mandate

ACA mandates that any "group health plan" must provide coverage for certain "preventive care" without "any cost sharing." 42 U.S.C. § 300gg-13(a). ACA allowed the Health Resources and Services Administration (HRSA), a division of Defendant HHS, to define "preventative care." 42 U.S.C. § 300gg-13(a)(4).

HRSA's definition includes FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, including "emergency contraception" such as Plan B (the "morning-after" pill), Ella (the "week-after" pill), and certain intrauterine devices. Dkt. 1 (Ex. 2) at 11-12.[2] The FDA's Birth Control Guide notes that these drugs and devices may work by preventing "attachment (implantation)" of a fertilized egg in the uterus. Dkt. 1 (Ex. 2) at 11-12.

HHS allowed HRSA "discretion" to create an exemption for "certain religious employers from the Guidelines" regarding "contraceptive services." 76 Fed. Reg. 46621-01 (published Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A)-(B). On June 28, 2013, HHS issued the long-awaited final rule—the Mandate. It treats only certain entities as

[2] Plaintiffs object to four of the twenty currently FDA approved methods (similar to the *Hobby Lobby* plaintiffs), namely: (1) Ella; (2) Plan B, Plan B One-Step, and Next Choice (Levonorgestrel); (3) the Copper IUD; and (4) the IUD with Progestin.

exempt "religious employers"—institutional churches, their integrated auxiliaries and the exclusively religious activities of a religious order—that are "organized and operate[d]" as nonprofit entities and "referred to in section 6033" of the Internal Revenue Code. 78 Fed. Reg. at 39874(a); 45 C.F.R. § 147.131(a).[3] The Mandate creates a separate "accommodation" for any non-exempt religious organization that (1) "[o]pposes providing coverage for some or all of the contraceptive services required"; (2) "is organized and operates as a nonprofit entity"; (3) "holds itself out as a religious organization"; and (4) "self-certifies that it satisfies the first three criteria." 78 Fed. Reg. at 39874; 45 C.F.R. § 147.131(b). Such entities must sign the certification before "the beginning of the first plan year" beginning on or after January 1, 2014, and deliver it to the plan's insurer or third party administrator. 78 Fed. Reg. at 39875.

Delivery triggers the insurer's or third party administrator's obligation to make "separate payments for contraceptive services directly for plan participants and beneficiaries." *Id.* at 39875-76; *see* 45 C.F.R. § 147.131(c)(2)(i)(B); 29 C.F.R. § 2590.715–2713A. If a third party administrator of a self-insured plan declines to provide the services, the objecting religious organization must find one that is willing in order for the accommodation to result in payments for the drugs. 78 Fed. Reg. at 39880.

If a third party administrator ("TPA") is willing, the religious organization—via its self-certification—must expressly designate the TPA as its "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive

[3] Whether an entity is an "integrated auxiliary" of a church turns primarily on the degree of the church's control over and funding of the entity. *See* 26 C.F.R. § 1.6033-2(h)(2) & (3) (affiliation); *id.* § 1.6033-2(h)(4) (internal support). The definition was for tax considerations, not religious conscience concerns, and thus can arbitrarily turn on whether a religious non-profit receives 49% or 50% of financial support from a formal church in a given year.

services for participants and beneficiaries." *Id.* at 39879. The self-certification must notify the TPA of its "obligations set forth in these final regulations." *Id.* at 39879.

By contrast to this convoluted "accommodation" for religious organizations, many secular businesses are simply exempt. Employers who provide "grandfathered" health care plans, covering an estimated 87 million people, are exempt. *See* 42 U.S.C. § 18011 (2010); Dkt. 1 (Ex. 4) at 5. Employers with fewer than fifty employees, covering an estimated 34 million individuals, also may avoid certain fines under the Mandate. *See* 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d); Dkt. 1 (Ex. 6) at 1.

The Parties and Their Religious Exercise

The Southern Baptist Convention formed GuideStone in 1918 to provide benefits for ministers of the gospel and denominational workers, "within the bounds" of the Southern Baptist Convention. Head Decl. ("Ex. 1") ¶ 4. In carrying out that mission, GuideStone established a health benefits plan for and limited to current and former employees of organizations (and their dependents) that are "controlled by or associated with" the Southern Baptist Convention (the "GuideStone Plan"). *Id.* The GuideStone Plan is one of the largest church health care plans in the country, serving hundreds of churches and ministries and providing health benefits to more than 78,000 people. *Id.*

As an arm of the Southern Baptist Convention, GuideStone shares the beliefs about the sanctity of human life stated in Article 15 of the *Baptist Faith and Message 2000* adopted by the Southern Baptist Convention:

> All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. . . . **We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death.** . . . In order to promote these ends Christians should be ready to work with all men of good will in

> any good cause, always being careful to act in the spirit of love without compromising their loyalty to Christ and His truth.

Ex. 1 ¶ 17; Dr. Armstrong Decl. ("Ex. 3") ¶ 4. Consistent with those beliefs, the GuideStone Plan does not pay or reimburse for expenses associated with "elective termination of a pregnancy by any method," including contraceptive methods that may cause early abortions. Ex. 1 ¶ 18.

Reaching Souls is an Oklahoma not-for-profit corporation founded in 1986 by a Southern Baptist minister and evangelist with the mission of training African pastors and evangelists. Wells Decl. ("Ex. 2") ¶ 3. Reaching Souls believes the Bible teaches that all people are our neighbors, including the unborn. *Id.* ¶ 4. Reaching Souls' beliefs are consistent with the Southern Baptist Convention's teachings about the sanctity of all human life, and Reaching Souls has adopted the GuideStone Plan to provide health benefits for its 10 full time employees in a manner that is consistent with its commitment to the sanctity of human life and the well-being of its employees. *Id.* ¶¶ 5-6, 13.

Truett-McConnell is a private, Christian, coeducational liberal arts college that has adopted the Southern Baptist Convention's *Baptist Faith and Message 2000* as its own statement of faith. Ex. 3 ¶¶ 3-5. Truett-McConnell is committed to the sanctity of life from conception to natural death and has adopted the GuideStone Plan to provide health benefits for its employees consistent with those beliefs. *Id.* ¶¶ 5-7.

The class consists of employers that: (i) have adopted or will in the future adopt the GuideStone Plan to provide medical coverage for their "employees" or former employees and their dependents ("employees" for purposes of this requirement has the meaning set forth in section 414(e)(3)(B) of the Internal Revenue Code of 1986 (the

"Code")); (ii) are or could be reasonably construed to be "eligible organizations" within the meaning of the Mandate; and (iii) are not "religious employers" within the meaning of the Mandate. Ex. 1 ¶ 30. The class includes approximately 187 employers in 26 states that are "eligible organizations" sharing the core convictions of the Southern Baptist Convention regarding the sanctity of life from conception to natural death. *Id.* ¶ 31.

The Mandate's Burden on Plaintiffs' Religious Exercise

The Plaintiffs' religion prohibits them from complying with the Mandate. Reaching Souls, Truett-McConnell and the other class members cannot trigger the provision of abortion-causing drugs and devices by providing a certification to another party, or by designating another party to do it for them. Ex. 2 ¶¶ 9, 19-20; Ex. 3 ¶¶ 10, 21-22. These Plaintiffs are barred by their religion from facilitating access to these products. Ex. 2 ¶¶ 9, 19-20; Ex. 3 ¶¶ 10, 21-22. Likewise, GuideStone cannot facilitate access to these products, whether by paying for them, contracting with a third party administrator who will pay for them, or otherwise allowing or helping any party to be designated to distribute them in connection with the GuideStone plan. Ex. 1 ¶¶ 19, 22-25. GuideStone is barred by its religion from facilitating access to these products. *Id.* If Plaintiffs continue their religious exercise of providing health benefits without abortion-inducing drugs and devices, however, they face enormous penalties from the government. Ex. 2 ¶ 13; Ex. 3 ¶¶ 14-15. For example, Reaching Souls currently has approximately 10 full time employees covered under its health plan and could incur penalties of approximately $365,000 per year based on its current employee count, which would have a devastating and fatal impact on its operations. Ex. 2 ¶ 13. Truett-McConnell has

approximately 78 full time employees and could incur penalties of approximately $2,847,000 per year, which would also have a devastating impact. Ex. 3 ¶ 14. With 187 non-exempt employers and over 5,144 full-time employees, Ex. 1 ¶ 31, if GuideStone continues to offer employee health benefits without the mandated items, class members would incur penalties of approximately $514,400 per day–$187,756,000 per year−and expose themselves to private enforcement suits. Ex. 1 ¶ 35; *see* 26 U.S.C. §§ 4980D & 9815 (preventive services requirements set forth in 42 U.S.C. § 300gg-13(a)(4)); 29 U.S.C. §§ 1185d(a)(1), 1132. These threatened penalties impose substantial pressure on Plaintiffs to stop their religious exercise. Ex. 1 ¶ 25; Ex 2 ¶ 17; Ex. 3. ¶ 19.

Similarly, GuideStone estimates losses of $39 million in contributions from "eligible organizations" that may be forced to leave the GuideStone Plan. Ex. 1 ¶ 43. This departure would have a dramatic financial impact upon GuideStone and likely require it to reduce its personnel and other resources that carry out its ministries. *See id.* ¶ 38. There would also be a significant impact upon the employers that remain in the GuideStone Plan because of increased costs resulting from loss of scale and the impact on the financial stability of the GuideStone Plan. *See id.* ¶ 42. These consequences impose substantial pressure on GuideStone to stop its religious exercise. *See id.* ¶ 25.

Moreover, forcing Plaintiffs to cancel their health plans would compromise their shared religious beliefs, which motivate them to promote the spiritual and physical well-being of their employees by providing health benefits. *See* Ex. 1 ¶ 38; Ex. 2 ¶¶ 6-7; Ex. 3 ¶¶ 6-8. By discontinuing all coverage, Plaintiffs would also be placed at a severe competitive disadvantage in their efforts to hire and retain employees, adversely

impacting Plaintiffs' ministries. Ex. 1 ¶¶ 39, 41; Ex. 2 ¶ 15; Ex. 3 ¶ 17. Some Plaintiffs would also face separate fines for canceling their plans. 26 U.S.C. § 4980H (a), (c)(1); Ex. 1 ¶ 36 ($7,608,000 penalty for the class); Ex. 3 ¶ 15 ($156,000 penalty for Truett-McConnell). The Mandate also substantially burdens GuideStone's religious ministry by pressuring it to stop its religious exercise of providing benefits without abortifacients, and forcing GuideStone to reduce its mission of providing health benefits to organizations sharing the core beliefs of the Southern Baptist Convention. *See* Ex. 1 at 25.

As they do every Fall, Plaintiffs are now planning for the 2014 plan year. Ex. 1 ¶ 48; Ex. 2 ¶ 22; Ex. 3 ¶ 24. This is a complex, time-consuming process, and it is already being burdened by the Mandate. Ex. 1 ¶ 48. The Mandate casts grave uncertainty on Plaintiffs' ability to provide health benefits for their employees and families next January — less than three months away. *See id.* ¶ 49. Enrollment must occur now. A lapse in coverage would be disastrous for Plaintiffs' operations and employees. *Id.* ¶ 49.

ARGUMENT

Injunctive relief is warranted here because (1) Plaintiffs have a likelihood of success on the merits, (2) there is a threat of irreparable harm, which (3) outweighs any harm to Defendants, and (4) the injunction would not adversely affect the public interest.[4] *See, e.g., Awad v. Ziriax,* 670 F.3d 1111, 1125 (10th Cir. 2012).

[4] "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981); *see also Heideman v. S. Salt Lake City,* 348 F.3d 1182, 1188 (10th Cir. 2003) ("The Federal Rules of Evidence do not apply to preliminary injunction hearings.").

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. The mandate violates the Religious Freedom Restoration Act

Under RFRA, the federal government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b); *see also United States v. Hardman,* 297 F.3d 1116, 1126 (10th Cir. 2002)(en banc). RFRA requires strict scrutiny to religious exercise claims. *See Gonzales,* 546 U.S. at 424, 430-31. The framework for analyzing a RFRA claim requires the court to "identify the religious belief" at issue; "determine whether this belief is sincere;" determine "whether the government places substantial pressure on the religious believer;" and finally, if there is substantial pressure, the government action will be upheld only if it satisfies strict scrutiny—*i.e.*, if it is "'the least restrictive means of advancing a compelling interest.'" *See Hobby Lobby*, 723 F.3d at 1140-43 (citation omitted); 42 U.S.C. § 2000bb-1.

Under this rubric, and under substantially similar facts, the *Hobby Lobby, Newland*, and *Armstrong* courts concluded that the Act's contraception mandate violated RFRA, because it substantially pressured the Plaintiffs to violate their sincere religious beliefs against facilitating access to abortion-inducing drugs and devices, without satisfying strict scrutiny. *See Hobby Lobby* at 723 F.3d at 1146-47; *Newland*, 2013 WL 5481997, at *2; *Armstrong*, 2013 WL 4757949 at 1.

1. Plaintiffs' religious beliefs forbid them from facilitating the provision of abortion-causing drugs and devices.

RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,'" 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), and abstaining from certain activities for religious reasons qualifies as "religious exercise," just as much as abstaining from work on certain days. *See Hobby Lobby CITE; see also Sherbert v. Verner,* 374 U.S. 398 (1963); *Thomas v. Review Bd.,* 450 U.S. 707 (1981); *see Wisconsin v. Yoder,* 406 U.S. 205 (1972); 42 U.S.C. § 2000bb(b)(1). Plaintiffs' religious beliefs are similar to the religious beliefs asserted in *Hobby Lobby* where the plaintiffs believed that human life begins when sperm fertilizes an egg and that it was "immoral for them to facilitate any act that causes the death of a human embryo." *Hobby Lobby*, 723 F.3d at 1122. The *Hobby Lobby* plaintiffs also objected to "'participating in, providing access to, paying for, training others to engage in, or otherwise supporting' the devices and drugs" at issue. *Id*. at 1140. In this case, Plaintiffs share the core convictions of the Southern Baptist Convention regarding the sanctity of life and believe that it would compromise their shared religious faith to intentionally facilitate the provision of abortifacient drugs and related services. *See* Ex. 1 ¶ 38; Ex. 2 ¶¶ 6-7; Ex. 3 ¶¶ 6-8. Paying for such benefits; providing paperwork that will trigger such benefits; designating another party to provide such benefits; and/or making certifications that would create a duty for third party administrators to provide such benefits would likewise impinge their religious beliefs. Ex. 1 ¶¶ 19, 22-25; Ex. 2 ¶¶ 9, 19-20; Ex. 3 ¶¶ 10, 21-22. Simply put, as a matter of religious faith, Plaintiffs may not participate in any way in the government's program to provide access to these services.

2. Plaintiffs' religious beliefs are sincere

In *Hobby Lobby*, the court saw "no reason to question" the plaintiffs' sincerity of similar beliefs. *See Hobby Lobby*, 723 F.3d at 1140. The court acknowledged the common nature of these beliefs in American culture: "The assertion that life begins at conception is familiar in modern religious discourse …. Moral culpability for enabling a third party's supposedly immoral act is likewise familiar." *Id*. at 1140 n.15. Under this element, the question is not "whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."[5] *Id.* at 1142; *see also A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010). Here, there is no legal basis to question the sincerity of Plaintiffs' beliefs, given the Southern Baptist Convention's long-standing and well publicized opposition to abortion. Ex. 1 ¶ 14; Ex. 2 ¶ 5 ; Ex. 3 ¶¶ 4-5.

3. The Mandate Requires Plaintiffs to Stop Their Religious Exercise

Government action substantially burdens a religious belief when it (i) "requires participation in an activity prohibited by a sincerely held religious belief," (ii) "prevents participation in conduct motivated by a sincerely held religious belief," or (iii) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138.

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[5] The *Hobby Lobby* court further noted that "it is not within the judicial function and judicial competence to inquire whether the petitioner . . . correctly perceived the commands of [his] faith. Courts are not the arbiters of scriptural interpretation." *Hobby Lobby*, 723 F.3d at 1138 (quoting *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 716 (1982)(internal quotation marks omitted). Rather, the only task "is to determine whether the claimant's belief is sincere." *Id.* at 1137.

As to the first prong, the Mandate expressly requires Plaintiffs to participate directly in the government's scheme by either providing coverage for contraceptive abortifacients themselves or designating a third party administrator for the purpose of providing such converge. 78 Fed. Reg. at 39879. Failure to do so will result in enormous fines to employers, and severe financial and religious harms to GuideStone. Ex. 1 ¶¶ 35-38. Under the second prong, all Plaintiffs currently cooperate in their religious exercise of providing health benefits consistent with their religious faith. Yet the Mandate prevents that continued religious exercise on threat of the penalties described above. As to the third prong, the Mandate's threatened fines and other harms create enormous pressure on Plaintiffs to comply with the Mandate's requirements. Thus the mandate imposes more than "substantial pressure . . . to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1138.

Not surprisingly, in *Hobby Lobby*, the Tenth Circuit found that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic." *Hobby Lobby*, 2013 WL 3216103, at *21. The same is true here.

4. The mandate cannot satisfy strict scrutiny

Defendants thus must prove that the Mandate is the least restrictive means of advancing a compelling interest. *See O Centro Espirita Beneficiente Uniao do Vegetal v. Gonzales*, 546 U.S. 418, 423 (2006). RFRA imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Defendants cannot meet it here.

The *Hobby Lobby* court considered Defendants' asserted interests in promoting "public health" and "gender equality" and concluded that they failed to satisfy strict scrutiny. *See Hobby Lobby*, 723 F.3d at 1143-44. First, these asserted government interests are too "broadly formulated" to justify denying "specific exemptions to particular religious claimants." *Id*. at 1143. Second, these interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people," including "those working for private employers with grandfathered plans," and those working "for employers with fewer than fifty employees." *Id*.; 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (exempting other religious employers); 26 U.S.C. § 5000A(d)(2)(A),(B),(ii)&(2)(B)(i) (exempting certain religious sects that object to insurance). "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id*. The *Hobby Lobby* court's conclusion compels the same result here.

Nor can Defendants plausibly claim that crushing the Plaintiffs with fines is the least restrictive means of meeting a compelling need for contraceptive access. Defendants have publicly acknowledged that "birth control … is the most commonly taken drug in America by young and middle-aged women" and that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[6] These services are widely available because the

[6] Statement by U.S. Dep't of Health & Human Servs. Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html (Oct. 21, 2012). Statements on government websites are admissions under Fed. R. of Evid. 801(d)(2)(A) and are self-authenticating under Fed. R. of Evid. 902(5).

federal government has constructed an extensive funding network designed to increase contraceptive access, education, and use, including requested spending of almost $300 million in fiscal year 2013 to provide contraceptives directly through Title X funding.[7]

Such alternative means of addressing the claimed interest doom the Mandate. *See, e.g., U.S. v. Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002) (explaining that, under strict scrutiny, government must "demonstrate that *no alternative forms of regulation would combat such abuses without infringing First Amendment rights*") (quoting *Sherbert v. Verner,* 374 U.S. 398, 407 (1963)) (emphasis in original). In addition to such direct provision, Defendants could: allay the costs of the drugs through individual subsidies, reimbursements, tax credits or tax deductions; empower other *willing* actors to deliver the drugs and to sponsor education about them; or use their own healthcare exchanges to offer coverage they believe is needed, rather than forcing the Plaintiffs to do it for them. Because Defendants have not employed feasible, less restrictive alternatives instead of burdening religious objectors, the Mandate violates RFRA. *See, e.g., Newland*, 881 F. Supp. 2d at 129; *see also Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (narrow tailoring requires "serious, good faith consideration of workable . . . alternatives").

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7 *See* Department of Health and Human Services, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants,* available at http://www.hhs.gov/opa/pdfs/fy-13-services-announcement.pdf at 9 (last visited Oct. 21, 2013) (announcing that "[t]he President[']s Budget for Fiscal Year (FY) 2013 requests approximately $297 million for the Title X Family Planning Program").

In sum, Plaintiffs are likely to prevail on their claim that the Mandate violates RFRA. *See Hobby Lobby*, 723 F.3d at 1137-1145; *Newland*, 2013 WL 5481997, at *2-3; *Briscoe*, 2013 WL 4781711, at *4; *Armstrong*, 2013 WL 4757949, at *1.

B. The Mandate Violates the First Amendment's Religion Clauses

The Mandate's second-class treatment of Reaching Souls and Truett-McConnell also violates the First Amendment. While the government has exempted other religious objectors from the Mandate (primarily, churches and their "integrated auxiliaries") it has refused to exempt the Plaintiffs and class members, even though they are engaged in the exact same religious exercise—and seek the exact same relief—as those preferred religious organizations the government has chosen to exempt. To put the matter bluntly: if these class members simply handed their ministry over to a church, to be funded and controlled directly by that church, the government would exempt them entirely. But because these class members instead fund, operate, and control their ministries themselves—in compliance with the long-held religious views of the Southern Baptist Convention regarding the sanctity of life—they face millions of dollars in fines.

The Free Exercise and Establishment Clauses prohibit the government from making such "explicit and deliberate distinctions between different religious organizations." *Larson v. Valente*, 456 U.S. 228, 246 n.23 (1982) (striking down laws that created differential treatment between "well-established churches" and "churches which are new and lacking in a constituency"). By preferring church-run organizations to other types of religious groups, the Mandate inappropriately "interfer[es] with an internal . . . decision that affects the faith and mission" of a religious organization, *Hosanna-*

Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012), and engages in "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]" *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.) (applying *Larson* to invalidate distinction between "sectarian" and "pervasively sectarian" organizations). Such discrimination is forbidden by the Religion Clauses.

The Mandate runs afoul of the First Amendment in another way as well. By only exempting churches, religious orders, and non-profit religious organizations that receive at least 50% of their funding from a church or denomination and thus qualify as "integrated auxiliaries," the government is drawing the kind of "explicit and deliberate distinctions between different religious organizations" that *Larson* condemned. 456 U.S. at 246 n.23. Unlike Roman Catholics, Episcopalians, and other hierarchal churches, Southern Baptists are "congregational churches in which each local congregation is autonomous." *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1288 (8th Cir. 1985). This autonomy naturally leads in many cases to financial and institutional autonomy. Whether a religious organization is exempt from the Mandate because it is an "integrated auxiliary" can turn in many cases on small differences in the organization's funding sources. Organizations affiliated with hierarchal churches, with their greater number of affiliates and the ability of religious organizations to direct subordinate organizations—unlike Southern Baptist organizations—are more likely to meet the "internally supported" requirement for integrated auxiliaries. Thus, the Mandate has the

effect of discriminating against religious organizations affiliated with non-hierarchal faiths like the Southern Baptists.

Defendants do not deny that they have engaged in this type of discrimination. Instead, they explained in the final regulations that they made assumptions about the likely religious beliefs of people who work for religious organizations like the Plaintiffs:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are *more likely* than other employers to employ people of the same faith who share the same objection, and who would therefore be *less likely* than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39874 (emphases added). Defendants cite no factual authority for this assumption. Plaintiffs have explicitly religious missions to which their employees subscribe, Ex. 1 ¶ 6; Ex. 2 ¶¶ 3-4; Ex. 3 ¶¶ 3-5, and there is no reason to believe Plaintiffs' employees are less likely to share their religious beliefs. And Defendants cite no legal authority for the proposition that the government is permitted to discriminate among different religious institutions, giving religious liberty to some and not to others, based on government predictions about the religious beliefs of individuals who work for various ministries. The government has no power to do so. *See Weaver*, 534 F.3d at 1259 (noting that distinguishing religious organizations based on their internal religious characteristics is "even more problematic than the Minnesota law invalidated in *Larson*" and that government cannot engage in such "discrimination . . . expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations[.]").

C. The Mandate Violates the Free Speech Clause.

The First Amendment protects Plaintiffs' rights to be free from governmentally compelled speech or silence. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). The Mandate violates both rights.

The Mandate's proposed accommodation requires Plaintiffs to make statements that will trigger payments for the use of contraceptive and abortion-inducing drugs and devices, and for "education and counseling" about using such products. Ex. 1 ¶ 45; Ex. 2 ¶ 20; Ex. 3 ¶ 22; 29 C.F.R. § 2590.715-2713A (b)(2), (c)(2). This would compel Plaintiffs to engage in speech they wish to avoid: speech facilitating a message and activities that contradict their public witness to their religious faith. The Mandate also expressly prohibits the Plaintiffs from engaging in speech with a particular content and viewpoint: they are barred by federal law from talking to a third party administrator and encouraging them not to provide contraceptive and abortion-inducing drugs and devices. *See* 29 C.F.R. § 2590.715-2713A ("must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements").

Each violation—compelled speech and compelled silence—triggers strict scrutiny, *TBS, Inc. v. FCC*, 512 U.S. 624, 642 (1994), which the Mandate fails for the reasons discussed above. *See also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) (rejecting forced speech requirement even for recipients of

government funds because it would render grantees able to express contrary beliefs "only at the price of evident hypocrisy").

II. IRREPARABLE HARM

The impending violation of Plaintiffs' rights under RFRA satisfies the irreparable harm factor. *See Hobby Lobby*, 723 F.3d at 1146; *Armstrong*, 2013 WL 5213640 *3 (D. Colo. Sept. 17, 2013); *Newland,* 881 F. Supp. 2d at 1294 (noting "it is well-established that the potential violation of Plaintiffs' constitutional and RFRA rights threatens irreparable harm") (citation omitted); *see also Kikumura,* 242 F.3d at 963.

The disruptions occasioned by this impending deadline are occurring *now.* Plaintiffs face the certain prospect of violating the mandate in less than three months' time—by January 1, 2014—and incurring steep penalties before a decision on the merits. *See Newland*, 881 F. Supp. 2d at 1294. Plaintiffs must: establish the structure and coverage provisions in advance of the 2014 plan year; make changes to the plan documentation and provide written notice of any material changes at least 60 days' in advance of the change; and coordinate with any third party administrators. As the *Newland* court found, Plaintiffs are confronted with imminent irreparable harm absent injunctive relief "[i]n light of the extensive planning involved in preparing and providing its employee insurance plan, and the uncertainty that this matter will be resolved before the coverage effective date." *Newland,* 881 F. Supp. 2d at 1294-95.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFFS' FAVOR

The balance of equities tips strongly in favor of Plaintiffs. The Tenth Circuit has recognized the considerable importance of an entity's religious liberty interests, and that

the Defendants' interest in enforcing the Mandate in this context is not compelling. *See Hobby Lobby*, 723 F.3d at 1143-44, 1145-46; *Newland,* 2013 WL 5481997, *3; *Newland,* 881 F. Supp. 2d at 1295. As the Tenth Circuit acknowledged, Plaintiffs have a Hobson's choice between catastrophic fines or facing pressure to violate one's religious beliefs. *See Hobby Lobby*, 723 F.3d at 1146-47.

In contrast, Defendants have already exempted churches and certain church-related entities from the mandate, exempted smaller employers, and given many non-religious employers an open-ended exemption in the form of grandfathering. Given that these exemptions apply to tens of millions of people, preventing Defendants from enforcing the mandate against Plaintiffs would not "substantially injure" Defendants. *See Newland,* 881 F. Supp. 2d at 1295. Granting a preliminary injunction will merely preserve the status quo, and any minimal harm in temporarily foregoing enforcement of the Mandate "pales in comparison to the possible infringement upon Plaintiffs' constitutional and statutory rights." *Newland,* 881 F. Supp. 2d at 1295; *Hobby Lobby*, 723 F.3d at 1141.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

"[T]here is a strong public interest in the free exercise of religion even where that interest may conflict with [another statutory scheme] . . . ." *Newland,* 881 F. Supp. 2d at 1295 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc)). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights" which are implicated by RFRA. *See Briscoe*, 2013 WL 4781711 at *5; *Hobby Lobby*, 723 F.3d at 1147. The public interest in enforcing a fundamental right outweighs the interest in immediate enforcement

of a new law that creates a "substantial expansion of employer obligations" and raises "concerns and issues not previously confronted." *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1296 (W.D. Okla. Nov. 19, 2012); *see also Newland,* 881 F. Supp. 2d at 1295; *Armstrong*, 2013 WL 5213640, at *4. This is particularly true where the government has created numerous exceptions to enforcement of the statute. *See Newland,* 881 F. Supp. 2d at 1295; *Hobby Lobby*, 723 F.3d at 1143-44.

V. PRELIMINARY INJUNCTION THAT BENEFITS THE ENTIRE CLASS

Plaintiffs seek a preliminary injunction that will benefit the entire class. The scope of preliminary injunctive relief depends on the scope of the harm to be prevented during the pendency of the matter. *See O Centro Espirita*, 389 F.3d at 977 (explaining that "[t]he underlying purpose of the preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held"). In this case, that harm is the impermissible government pressure to give up the religious exercise of providing, administering, and offering a health benefits plan consistent with Plaintiffs' faith.

Plaintiffs therefore request injunctive relief that maintains the status quo pending final resolution of the case. That status quo is the provision of health benefits that complies with Plaintiffs' faith, but without facing the enormous financial losses threatened by the Mandate. For Reaching Souls and Truett-McConnell, this requires an injunction permitting them to continue participation in the GuideStone Plan, and forbidding any application of the Mandate against them for that religious exercise. For GuideStone, preserving the status quo requires an injunction permitting it to continue offering the GuideStone Plan to all class members without facilitating access to the

products and services at issue, and without risk of penalty to participants in the GuideStone Plan. A preliminary injunction allowing GuideStone to continue offering its plan—and allowing employers to continue using it—is necessary to spare GuideStone from the illegal coercion imposed by the Mandate and described above.

The benefits of the injunction extend beyond the named plaintiffs to encompass all class members. But the court does not need to certify the proposed class now to provide adequate preliminary injunctive relief for the upcoming plan year. The Tenth Circuit has recognized that class certification is unnecessary if all class members will benefit from an injunction issued on behalf of the named plaintiffs. *See Kansas Health Care Assoc. v. Kansas Dept. of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994).[8]

[8] *See also* 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1785.2 (1986 & Supp. 1994); *Ill. League of Advocates v. Ill. Dept. of Human Servs.*, 13-C-1300, 2013 WL 3287145, at *3 (N.D. Ill. June 28, 2013) (holding that (1) "[d]istrict courts have the power to order injunctive relief covering potential class members prior to class certification" under their general equity powers; and (2) "[t]he lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.") (citing 3 Newberg on Class Actions § 9:45 (4th ed. 2002)). Other circuits have similarly held that a broad injunction can be entered affecting unnamed parties prior to class certification if it would be necessary to give the named plaintiff effective relief. *See Washington v. Reno*, 35 F.3d 1093, 1103-04 (6th Cir. 1994) (upholding a nationwide injunction because it found that "the appropriate relief to be granted to the plaintiffs on their Commissary Fund claim necessarily implicate[d] nationwide relief" and would otherwise be "illusory"); *see, e.g. Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1304-05, 1308-09 (4th Cir. 1992) (holding that an injunction prohibiting the eviction of public housing tenants beyond the named plaintiff without notice and a hearing was appropriate against government entities); *Bresgal v. Brock*, 843 F.2d 1163, 1165, 1169-71 (9th Cir. 1987) (finding that class-wide relief may be appropriate even in an individual action and that "[t]here is no general requirement that an injunction affect only the parties in the suit."); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 19 (D.D.C. 2004) (issuing a permanent injunction enjoining the Department of Defense from inoculating employees with the anthrax vaccine without the employees' consent); *cf. Mainstream Mktg. Servs., Inc. v. Fed. Trade*

A good example of this kind of injunction in a RFRA case is *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006). A church, its officers, and some of its members sought relief under RFRA to end the enforcement of importation restrictions on hoasca, a sacramental tea. The preliminary injunctive relief granted by the district court and affirmed by the Supreme Court not only protected the plaintiff church and its members, but also separately protected any other "bona fide participants in [church] ceremonies for religious use of hoasca." *O Centro Espirita Beneficiente Unaio Do Vegetal v. Ashcroft*, No. CV 00-1647, Document 100 (D.N.M. Nov. 13, 2002) (attached as Ex. 4). So, too, the named Plaintiffs here should receive an injunction prohibiting enforcement of the Mandate not only against them individually, but also against all other participants in the same church plan.

The only way to provide effective relief for GuideStone would be to enjoin enforcement of the Mandate with respect to all class members. The Mandate has provided Plaintiffs with a stark choice: (a) violate their religious beliefs by including this coverage in their health plans or involving the health plans' third-party administrators in doing so; or (b) oppose the Mandate and have the employers that remain in the plan incur devastating fines in the nature of $187,756,000 per year. Under either scenario, GuideStone is compromised in its ability to carry out its ministry assignment to provide health benefits in accordance with Southern Baptist teachings and will lose member

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Comm'n, 283 F. Supp. 2d 1151, 1158, 1171 (D. Colo. 2003) (addressing the constitutionality of a do-not-call regulation, the court permanently enjoined the FTC from enforcing the do-not-call list against any telemarketer nationwide), *rev'd on other grounds*, 358 F.3d 1228 (10th Cir. 2004).

participation and the $39,088,325 in health payments from employers that are forced to leave the plan. In the alternative, the Court could also certify the class, for the reasons set forth in Plaintiffs' forthcoming motion for class certification.

CONCLUSION

Plaintiffs request a preliminary injunction prohibiting Defendants, their agents, officers, and employees from making any effort to apply or enforce the substantive requirements imposed in 42 U.S.C. § 300gg-13(a)(4) (including, but not limited to, all requirements to provide health benefits for FDA approved contraceptive methods that are or could be abortifacients and related education and counseling (specifically including (1) ella; (2) Plan B, Plan B One-Step, and Next Choice (Levonorgestrel); (3) the Copper IUD; and (4) the IUD with Progestin)), and are enjoined and restrained from pursuing, charging, or assessing penalties, fines, assessments, or any other enforcement actions for noncompliance related thereto, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d (and including, but not limited to, penalties for failure to offer or facilitate access to contraceptives that are or could be abortifacients and related education and counseling (including (1) ella; (2) Plan B, Plan B One-Step, and Next Choice (Levonorgestrel); (3) the Copper IUD; and (4) the IUD with Progestin)) against Reaching Souls, Truett-McConnell, GuideStone, all non-exempt employer participants in the GuideStone Plan, and all third party administrators for the aforementioned parties as their conduct relates to the GuideStone Plan. Plaintiffs are willing to post a bond in an amount the Court deems appropriate. FED. R. CIV. P. 65.

Respectfully submitted this 25th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed through the Court's ECF filing system on October 25, 2013, and that a copy was served via first-class mail, postage prepaid, on the following:

Eric Holder
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CERTIFICATE OF CONFERENCE

I hereby certify that Mark Rienzi conferred with Ben Berwick, with the Department of Justice, on behalf of Defendants on October 25, 2013, and Mr. Berwick indicated that Defendants would be opposed to the relief requested herein.

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/s/ Jared Giddens